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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES, for the use and)
benefit of PERSONNEL PLUS)
EMPLOYMENT AGENCY, INC.,)
Plaintiff,)

vs.)

TRAVELERS CASUALTY AND)
SURETY COMPANY OF AMERICA,)
PAYMENT BOND NO. 105385885,)
Defendant.)

Case No.: 3:12-cv-00009-HRH

TRAVELERS CASUALTY AND)
SURETY COMPANY OF AMERICA,)
PAYMENT BOND NO. 105385885,)

Third-Party Plaintiff,)

vs.)

ACD RAIL SERVICES, LLC,)

Third-Party Defendant.)

THIRD-PARTY COMPLAINT

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, PAYMENT BOND NO. 105385885 brings this third-party complaint against ACD RAILWAY SERVICES, LLC, and alleges as follows:

JURISDICTION AND VENUE

1. Travelers Casualty and Surety Company of America (“Travelers”) is a Connecticut corporation doing business in Alaska. For purposes of 28 U.S.C. § 1332, Travelers is a citizen of the State of Connecticut.

2. Third-Party Defendant ACD Rail Services LLC (“ACD”) is, on information and belief, a Delaware limited liability company that has done business in Alaska. For purposes of 28 U.S.C. § 1332, ACD is a citizen of the State of Delaware.

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332, because the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and is between citizens of different states.

4. This Court also has jurisdiction over this action pursuant to 40 U.S.C. § 3131 et seq. (the “Miller Act”). Plaintiff Personnel Plus Employment Agency, Inc. (“Personnel Plus”) brought the underlying action on Payment Bond No. 105385885, issued by Travelers to Kiewit Building Group, Inc. (“Kiewit”). The basis of Plaintiff’s action and jurisdiction is the Miller Act. Because Travelers now seeks indemnification from a party associated with Kiewit for losses on the bond which are not ancillary to the underlying action, the Court has jurisdiction over this third-party claim pursuant to the Miller Act.

5. Venue is proper in this Court pursuant to 40 U.S.C. § 3133(b)(3).

FACTS

6. Travelers is a company authorized to issue surety bonds in the State of Alaska. Kiewit is a construction company authorized to contract for construction projects in Alaska.

7. At all relevant times Kiewit was general contractor on FTW 347, Railhead Operations Facility (Phase 2), a federal construction project at Fort Wainwright, Alaska (the "Project").

8. Travelers issued Payment Bond No. 105385885 to Kiewit for the Project.

9. As surety to Kiewit, Travelers had the same rights and defenses available to it as would be available to Kiewit in the event of a claim on the bond.

10. On or about July 19, 2011, Kiewit entered into a written subcontract with ACD. The subcontract provided that ACD would provide labor and materials for the Project, including, but not limited to, demolition of the existing Trainor Gate Facility at Fort Wainwright.

11. The subcontract provided that ACD would defend, indemnify and hold harmless Kiewit and any of its sureties from any claim arising from ACD's operations. ACD agreed to reimburse Kiewit for any attorneys' fees incurred as a result of said claims.

12. The subcontract also provided that, in the event ACD failed to perform under the requirements of the contract, Kiewit would have the right to terminate the subcontract for default, and recover from ACD any damages it suffered as a result of that failure.

13. On or about August 11, 2011, ACD contracted with Personnel Plus for the provision of labor for the Project.

14. On information and belief, Personnel Plus provided labor to ACD pursuant to its contract with ACD.

15. On information and belief, ACD failed to pay Personnel Plus for labor provided pursuant to the contract.

16. Kiewit terminated its contract with ACD for default following failure by ACD to prosecute its scope of work and failure to pay its laborers according to the requirements of the Davis Bacon Act, 40 U.S.C. § 3141, et seq.

17. Personnel Plus filed the underlying action against Travelers, making a claim on Bond No. 105385885.

COUNT 1
(Breach of Contract with Kiewit)

18. The preceding allegations are incorporated as if fully set forth herein.

19. By failing to pay Personnel Plus for services provided as part of the Project, ACD breached its contract with Kiewit.

20. Kiewit and Travelers have sustained damages by reason of ACD's breach.

21. ACD's failure to perform and subsequent termination for default entitle Kiewit and/or its surety to recover from ACD all damages incurred as a result of the failure, pursuant to the terms of the subcontract.

COUNT 2
(Contractual Duty to Indemnify)

22. The preceding allegations are incorporated as if fully set forth herein.

23. Because a party has now made a claim against Travelers arising from the actions of ACD, ACD was required to defend, indemnify and hold harmless Kiewit and Travelers, pursuant to its agreement with Kiewit to defend, indemnify and hold harmless Kiewit and any surety of Kiewit.

24. Kiewit has tendered the claims of Personal Plus to ACD, which tender has been ignored.

COUNT 3
(Implied Duty to Indemnify)

25. The preceding allegations are incorporated as if fully set forth herein.

26. There exists in every contract for construction services between a contractor and subcontractor an implied promise that the subcontractor will perform services in a proper manner, and will indemnify the contractor from damages that result from the subcontractor's performance and are not caused by the contractor.

27. As subcontractor to Kiewit, ACD has an implied duty to indemnify Kiewit and Travelers, which duty has been breached by ACD, causing damage to Kiewit and Travelers.

RELIEF REQUESTED

WHEREFORE, Travelers prays for the following relief:

1. Judgment against ACD in an amount to be determined at trial;
2. An order requiring that ACD defend, indemnify and hold harmless Kiewit and Travelers for any and all claims by Personnel Plus;
3. That Travelers be awarded its costs and attorneys' fees; and
4. For such other and further relief as this Court deems just and equitable.

DATED this 21st day of February, 2012.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Defendant/Third-Party Plaintiff

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of February, 2012, a true and correct copy of the foregoing was served on the following via electronic delivery:

Mr. Jason J. Ruedy
Law Offices of Royce & Brain
jruedy@roycebrain.com

BIRCH HORTON BITTNER & CHEROT

By: /s/ Stephen H. Hutchings